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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

IN RE MOSES N. ASLAN,
Debtor.

THE HONGKONG AND SHANGHAI BANKING CORPORATION AND CENTRAL BANK,
Petitioners,

v.

MOSES N. ASLAN,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. If a bankruptcy claim, based on a final state court judgment and allowed by the Bankruptcy Court, is partially disallowed on appeal, does due process of law require an evidentiary hearing before the judgment creditor is required to perform an agreement giving the debtor a credit against the judgment, where (a) the credit had been conditioned on full performance and payment of the judgment, and (b) the Bankruptcy Court never held such a hearing?

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption and were the only parties before the Ninth Circuit Court of Appeals.

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Petitioners,

v.

MOSES N. ASLAN,
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners The Hongkong and Shanghai Banking Corporation ("Hongkong Bank") and Central Bank (sometimes collectively "the Banks") respectfully pray that if a writ of certiorari is issued on the Petition of Moses N. Aslan ("Aslan"), a writ of certiorari then issue on this Cross-Petition to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on the Banks' cross-appeal on May 29, 1992.

OPINION BELOW

The Memorandum Opinion of the Ninth Circuit Court of Appeals filed May 29, 1992 (the "Opinion") was unpublished, and a copy is attached to Aslan's Petition as Appendix B. The Court of Appeals denied Aslan's Petition for Rehearing and Suggestion For Rehearing en banc by order filed July 28, 1992, a copy of which is attached to Aslan's Petition as Appendix A.

The Opinion, on rehearing, modified the earlier memorandum opinion of the Ninth Circuit Court of Appeals filed March 25, 1991, a copy of which is attached to Aslan's Petition as Appendix C. Thus, the Opinion affirms the order of the United States District Court for the Central District of California, a copy of which is attached to Aslan's Petition as Appendix D, affirming without opinion the decision of the United States Bankruptcy Court for the Central District of California entered January 5, 1988. The Bankruptcy Court's Findings of Fact and Conclusions of Law, and its Order, are attached to Aslan's Petition as Appendices E and F respectively.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the Opinion. The date of entry of the Opinion is May 29, 1992. The Banks expressly rely upon Rule 12.3 of the Rules of this Court; the Petition for Writ of Certiorari in response to which this Cross-Petition is filed was received on October 27, 1992.

CONSTITUTIONAL PROVISION INVOLVED

A. United States Constitution, Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The facts underlying the Banks[1] claims are set forth in detail in the Banks' Brief in Opposition to the Petition for Writ of Certiorari, filed concurrently herewith. Those facts will be presented herein in summary form only, together with a full exposition of the facts upon which this Cross-Petition is based.

The Banks sued Aslan after learning that he had stolen about $3.2 million from them through a "check kite." The Banks sought recovery of the proceeds from the check kite plus interest thereon, other damages, and imposition of a constructive trust on Aslan's real properties by virtue of his investment of the stolen funds in those properties.

In addition to the check kite, Aslan had defaulted on a loan from Hongkong Bank, secured by a deed of trust on the Rowan Building. On the eve of Hongkong Bank's foreclosure on the Rowan Building, Aslan agreed to the stipulated Judgment which is the subject of his Petition. The Judgment, entered after a full hearing, awarded the Banks damages of $8,373,298.56, together with an interest in Aslan's real properties; the Judgment could be reduced, and Aslan could retain his properties, if he made four timely payments totaling $6,373,298.56.

Meanwhile, no agreement was reached concerning the foreclosure sale of the Rowan Building, and the sale ultimately was

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[1]Pursuant to Supreme Court Rule 29.1: Hongkong Bank is a wholly owned subsidiary of HSBC Holdings plc. Hongkong Bank's subsidiaries (other than wholly owned subsidiaries) are Aspiration Land Investment Ltd.; Banking Computer Services Pte. Ltd.; Collyer Quay Properties Ltd.; Electronic Payment Services Co. (HK) Ltd.; Eltis Precision Printing Ltd.; Hang Seng Bank Ltd.; The Hong Kong Futures Guarantee Corporation, Ltd.; Hongkong and Shanghai Thomas Cook Ltd.; The International Investment Company of Chile S.A.; Isoba Ltd.; Ocean Properties Pte. Ltd.; Ocean Towers Pte. Ltd.; Ortigas and Company Limited Partnership; Plimmer City Centre Ltd.; Tindalk Ltd.; Vinebel Realties Ltd.; and Xinjiang World Plaza Hotel Ltd. Central Bank, now known as Bank of the West, is a wholly owned subsidiary of Banque Nationale de Paris. Bank of the West has no non-wholly-owned subsidiaries.

conducted. Hongkong Bank bought the Rowan Building at the foreclosure sale, and subsequently resold it at a net profit of $3,137,209.58.

Hongkong Bank thereafter entered into the August 1, 1985 Letter Agreement with Aslan, whereby the Bank agreed to credit that net profit against the Judgment, on the express condition, among others, that Aslan affirm, ratify, and perform all his obligations under the Judgment, including timely payment of all the sums required. [Appellant's District Court Excerpts of Record at 38, 41, 225-226.] Aslan's then-counsel, Charles T. Rose ("Rose"), explained to his client that if Aslan failed to perform all the terms and conditions of the Judgment, or attacked the Judgment, Aslan would forfeit any right to the credit from the resale of the Rowan Building. Rose told Aslan that the Rowan Building profit belonged to Hongkong Bank and was a "pure gift" to Aslan. [Respondents' (Banks') District Court Excerpts of Record at 749-750.] All Aslan had to do was abide by the stipulated Judgment, and not attack it.

Contrary to his obligations, Aslan did attack the Judgment. He sought a reduction of the Banks' claim under the Judgment on the stated ground that the $2,000,000 early payment discount afforded him under the Judgment was, in fact, an unenforceable penalty. The Bankruptcy Court ruled against him on his "penalty" argument, finding only not only that the Judgment did not contain any unenforceable penalty but also that under principles of *res judicata* the Court would not reopen, modify or reexamine the Judgment. [Aslan's Petition ("Pet."), Appendix ("App.") at E-6.] Thus, the Bankruptcy Court permitted the Banks to recover the entire Judgment amount by virtue of their proof of claim in Aslan's bankruptcy case. However, inasmuch as the Banks were receiving the benefit of their bargain under the Letter Agreement, i.e., the entire Judgment amount, the Bankruptcy Court also ruled that Aslan was entitled to the credit of the Rowan Building profit. [*Id.*] Because the Bankruptcy Court invoked *res judicata*, the Court never held any evidentiary hearing concerning Aslan's contention that the Judgment included a penalty; nor was any evidentiary hearing held on the question of whether *if* Aslan's attack on the Judgment had succeeded, then consideration would

have failed for the Rowan Building credit and Aslan would not have been entitled to retain it.

Aslan appealed from the Bankruptcy Court's refusal to find the $2,000,000 discount to be a "penalty", and the Banks cross-appealed from the determination that Aslan was still entitled to the Rowan Building credit. The District Court affirmed without opinion. The Ninth Circuit Court of Appeals initially reversed the "penalty" determination but, upon rehearing, likewise affirmed the lower court's rulings. In its May 29, 1992 Opinion, the Court of Appeals held that *res judicata* does apply in bankruptcy proceedings, and that none of the exceptions to its applicability was present. The Court also held, among other things, with respect to the Rowan Building credit, that inasmuch as the Banks had been paid the full amount of the Judgment, including interest, therefore the contention that Aslan had breached the Letter Agreement by failing to perform was without merit. [Pet., App. at B-7.]

ARGUMENT: IF ASLAN'S PETITION IS GRANTED, AND THE JUDGMENT IN FAVOR OF THE BANKS IS REDUCED, THEN DUE PROCESS REQUIRES THAT THE BANKS BE AFFORDED A HEARING ON ASLAN'S RIGHT TO RETAIN THE ROWAN BUILDING CREDIT

A. Summary of Argument.

The Banks accept the Ninth Circuit's Opinion, and contend that Aslan has utterly failed to establish any basis for granting his Petition for a Writ of Certiorari. The Banks urge denial of Aslan's Petition.

However, in the event that this Court does grant Aslan's Petition, and subsequently either finds for Aslan on the merits of his "penalty" argument or remands that question to the Bankruptcy Court for a factual determination, then due process of law requires that the entire case be remanded to the Bankruptcy Court, for an evidentiary hearing on the rights of the parties with

regard to the Rowan Building profits.[2] To reduce the Banks' Judgment, without affording them an evidentiary hearing on whether such reduction vitiates Aslan's right to the Rowan Building resale profit, would depart from the accepted course of judicial proceedings. [S.Ct.R. 10.1(a).]

B. The Banks Cannot Be Deprived Of The Rowan Building Profits Without Due Process Of Law.

This Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). "The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard at a meaningful time and in a meaningful manner." *Orloff v. Cleland*, 708 F.2d 372, 379 (9th Cir. 1983).

Due process is a flexible concept which requires, at a minimum, a meaningful opportunity to be heard. *Little v. Streater*, 452 U.S. 1, 5-6, 101 S.Ct. 2202, 68 L.Ed. 627 (1981).

No evidentiary hearing has been held regarding the intent of the parties in entering into the Judgment and the Letter Agreement, or the surrounding circumstances. No such hearing has been necessary, because the lower courts' rulings have properly invoked *res judicata* in precluding Aslan from collaterally attacking the final and valid state court Judgment.

However, as the Banks have argued in their accompanying Brief in Opposition to Aslan's Petition, if the Court otherwise finds any merit in Aslan's argument, the penalty question should be remanded for an evidentiary hearing. Whether a contract

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[2] It appears that if this Court does wish to review Aslan's "penalty" argument, the Court *sua sponte* may also review the Banks' claims regarding the Rowan Building profit. *Langnes v. Green*, 282 U.S. 531, 538, 51 S.Ct. 243, 75 L.Ed. 520 (1931). However, there is also authority for the proposition that absent a cross-petition for certiorari, the Banks' contentions would not be open to review. *See Brennan v. Arnheim and Neely, Inc.*, 410 U.S. 512, 516, 93 S.Ct. 1138, 35 L.Ed.2d 463, *reh. denied*, 411 U.S. 940, 93 S.Ct. 1888, 36 L.Ed.2d 402 (1973). This Cross-Petition is filed in light of these authorities, as a matter of caution.

contains a penalty is a question of fact. *Los Angeles City School District v. Landier Investment Co.*, 177 Cal.App.2d 744, 753, 1 Cal.Rptr. 662 (1960). When a factual issue has not been previously litigated in the trial court, the appellate court should remand the matter rather than deciding the issue upon an inadequate record. *Mouser v. United Security Life*, 267 F.2d 3, 4 (9th Cir. 1959).

Likewise, if Aslan prevails on his "penalty" argument, the question of his entitlement to the Rowan Building profits is necessarily affected, for two reasons. First, as the Banks have explained herein, the Bankruptcy Court did not need to, and therefore did not, conduct any evidentiary hearing with regard to the circumstances of the Letter Agreement. Second, it would be inequitable to permit Aslan to recover $2,000,000 on his attack upon the Judgment, yet at the same time to permit him a $3.1 million windfall — a "pure gift," in his counsel's words — the consideration for which was supposed to be his forbearance from making that very attack. *I.e.*, if Aslan is permitted to successfully attack the Judgment, contrary to his obligations under the Letter Agreement, then a hearing must be held on whether his attack on the Judgment is a breach of the Letter Agreement, or a failure of consideration thereunder which precludes Aslan from retaining the Rowan Building credit. It is possible that under such circumstances, the Bankruptcy Court would not give the credit to Aslan. "[A] court must avoid an interpretation which will make a contract extraordinary, harsh, unjust or inequitable." *Strong v. Theis*, 187 Cal.App.3d 913, 920, 232 Cal.Rptr. 272 (1986).

On remand, the Bankruptcy Court would be justified, also, in finding that under the Letter Agreement, Aslan was not permitted to simply recite that he affirmed and ratified the Judgment, but then to breach that promise, attack the Judgment, and still benefit from the Letter Agreement's terms. "[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Northridge Hospital Foundation v. Pic 'N' Save No. 9*, 187 Cal.App.3d 1088, 1100, 232 Cal.Rptr. 329 (1986). Similarly, the Bankruptcy Court could find that a successful attack by Aslan on the final $2,000,000 portion

of the Judgment excuses Hongkong Bank from any obligation to permit Aslan to retain the Rowan Building credit. "A party to a contract need not tender performance if the conduct of the other party acts as a waiver or amounts to a refusal to perform in any event, or an abandonment of the contract." *United California Bank v. Maltzman*, 44 Cal.App.3d 41, 52, 118 Cal.Rptr. 299 (1974).

Under these circumstances, where no evidentiary hearing ever was held on the matter, it would be improper to revisit Aslan's entitlement to a $2,000,000 reduction of the Judgment, without also affording the Banks a hearing on whether a result favorable to Aslan, on that question, vitiates Aslan's right to the Rowan Building credit. A result which, on the circumstances of this record, gave Aslan *both* the $2,000,000 reduction *and* the $3.1 million credit would be such a departure "from the accepted and usual course of judicial proceedings" that this Court's intervention would be required. [S.Ct. R. 10.1(a).]

CONCLUSION

The Banks submit that Aslan's Petition must be denied (and, with it, this Cross-Petition [S.Ct.R. 13.5]). However, if Aslan's Petition is granted, *and* Aslan prevails on his "penalty" argument or the "penalty" question is remanded to the Bankruptcy Court, then due process of law and complete justice between the parties require that the entire case, including the parties' rights with regard to the Rowan Building credit, be remanded.

For the reasons set forth herein, the Banks respectfully request that Aslan's Petition be denied; but that if Aslan's Petition is granted, this Cross-Petition also be granted so that the entire case may be remanded for any appropriate proceedings in the Bankruptcy Court.

Respectfully submitted,

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THE HONGKONG AND SHANGHAI BANKING CORPORATION AND CENTRAL BANK,
Cross-Petitioners,

v.

MOSES N. ASLAN,
Cross-Respondent.

BRIEF OF CROSS-RESPONDENT IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Cross-Respondent set forth a clear and concise statement of the facts upon which the Petition for Writ of Certiorari (the "Petition") is based in the Petition. The Cross-Petitioners greatly elaborated on these facts in their Brief for Respondents in Opposition (the "Brief in Opposition"). This expanded statement of the facts was referenced in their Cross-Petition for Writ of Certiorari (the "Cross-Petition") along with their version of the facts upon which the Cross-Petition rests.[1]

The Cross-Respondent submits that the additional "facts" asserted by the Cross-Petitioners contain numerous allegations made by various persons in declarations filed in support of a number of pleadings in the courts below, that these allegations were and are disputed by the Cross-Respondent, and that most if not all of these allegations cannot be considered "facts" for the purposes of this appeal. The Cross-Petitioners' statement of the facts goes far beyond a clear and concise statement of the undisputed facts and contains numerous misstatements.

To remedy this, the Cross-Respondent will recite herein the undisputed material facts upon which the Petition and Cross-Petition are based, and then point out the misstatements in the Cross-Petitioners' Brief in Opposition and Cross-Petition.

A. Statement of the Facts Material to the Petition.

The Cross-Petitioners are the holders of a disputed claim against the bankruptcy estate of Moses N. Aslan who is the Cross-Respondent herein and the debtor in a Chapter

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[1]The Hongkong and Shanghai and Central Banks shall be referred to as "Cross-Petitioners" and Moses N. Aslan shall be referred to as "Cross-Respondent" herein.

11 case currently pending in the Central District of California. The claim arose when the Cross-Petitioners filed a lawsuit against Aslan and others alleging in part that Aslan was involved in a check kiting scheme and alleging actual damages in the amount of $3,151,158.22 plus interest, punitive damages, treble damages under RICO and other relief. The Third Amended Complaint was filed in December 1983.

At the time, the Cross-Respondent owned several parcels of real estate in the City of Los Angeles. Claiming entitlement to a constructive trust, the Cross-Petitioners recorded lis pendens upon all of these parcels, making it virtually impossible for the Cross-Respondent to remedy his financial affairs without first satisfying the Cross-Petitioners. With respect to one of these parcels, known as the Rowan Building, the Cross-Petitioners also held a deed of trust and commenced foreclosure proceedings in December 1984.

The lawsuit was eventually settled on or about March 25, 1985, the date set for the foreclosure of the Rowan Building, by an agreement that was subsequently memorialized in the Stipulated Judgment. The Stipulated Judgment provided for entry of a judgment against the Cross-Respondent and in favor of the Cross-Petitioners in the amount of $8,373,298.56, plus interest, or alternatively for conveyance of legal title of the parcels of real estate to the Cross-Petitioners, and for reduction of the judgment to $6,373,298.56 upon timely payment of that amount in installments due on July 1, 1985, September 30, 1985, December 31, 1985, and June 30, 1986, among other provisions.

Subsequently, the characterization of the $2 million difference between the $8,373,298.56 judgment sum and the $6,373,298.56 reduced judgment sum has been the subject of much dispute between the Cross-Respondent and the Cross-Petitioners. The Cross-Respondent has contended

that this $2 million constitutes an illegal penalty and as such should not be allowed as part of the Cross-Petitioners' bankruptcy claim. This argument was first made in the Cross-Respondent's objection to the Cross-Petitioners' Amended Proof of Claim, which was filed on or about July 28, 1986 in the amount of $9,401,032.96. No evidentiary hearing on this issue has ever been held in the bankruptcy court.

B. Statement of the Facts Material to the Cross-Petition.

On or about June 11, 1985, after postponing the foreclosure sale on the Rowan Building for some time, the Cross-Petitioners finally held their foreclosure sale. The Cross-Petitioners were the successful bidders, credit bidding the amount of $1,694,010.66, the amount due under the note secured by the lien on the Rowan Building. In July 1985, the Cross-Petitioners sold the Rowan Building to the Rowan Development Corporation for $5,000,000.00.

Shortly thereafter, on August 1, 1985, the Cross-Respondent and the Cross-Petitioners entered into the Letter Agreement, pursuant to which the Cross-Petitioners agreed to, and did, credit the net proceeds of the Rowan Building resale to the full and complete payment of the July 1, 1985, and September 30, 1985, installment payments referenced in the Stipulated Judgment. The Letter Agreement also contained provisions requiring Aslan to ratify, affirm and approve all of the provisions of the Stipulated Judgment.

The Cross-Petitioners contend that the Letter Agreement required the Cross-Respondent to forbear from attacking the Stipulated Judgment in order to receive the benefits of the credit of the Rowan Building resale. The Cross-Respondent disputes this position. The Bankruptcy Court ruled that Aslan was entitled to the credit provided in the Letter Agreement. This ruling was affirmed by the District Court and by the Ninth Circuit Court of Appeals.

C. Misstatements of Fact in the Brief in Opposition and Cross-Petition.

The Cross-Petitioners have repeatedly included "facts" in briefs submitted below and in this Court that are based on inadmissible hearsay contained in declarations filed in support of various pleadings submitted to the courts below. These so-called facts must be disregarded by this Court in considering the Petition and Cross-Petition.

First, the Cross-Petitioners assert that the Cross-Respondent admitted he engaged in a check kiting scheme. This is a distortion of the record. The Cross-Petitioners cite to the declarations of Charles Levy and Douglas Wiita, both of whom are or were counsel for the Cross-Petitioners, respecting statements they purportedly heard the Cross-Respondent make. Not only are these statements hearsay, but neither declarant has ever been subjected to cross-examination with respect to their declarations.

The Cross-Petitioners also seem to find it significant that the Cross-Respondent did not specifically object to the check kiting assertion in the Amended Proof of Claim filed by the Cross-Petitioners nor object when the Cross-Petitioners' counsel repeated the allegation in oral argument on the issue of whether the Cross-Respondent could be in default of his obligation to make the fourth payment after the filing of the bankruptcy case. Failure to object in these circumstances, however, does not lead to the conclusion that the Cross-Respondent admitted he had engaged in check kiting. The Cross-Respondent urges the Court to note that neither the Stipulated Judgment, the Letter Agreement nor the Bankruptcy Court's Findings of Fact contain any admission or finding that the Cross-Respondent engaged in the alleged check kiting scheme. The fact is that the Cross-Respondent has consistently denied such allegation.

Second, the Cross-Petitioners allege that the Cross-Respondent has misstated the facts by stating that the

lawsuit was based on a claim of actual damages in the amount of $3,151,158.22 plus interest. Although the Cross-Respondent concedes that the Cross-Petitioners also sued for punitive damages and other relief under other counts, the fact remains that the Cross-Petitioners claimed that the amount of the alleged check kite was approximately $3.1 million.

Further, in the Brief in Opposition, the Cross-Petitioners claim that the Cross-Respondent admitted using funds from the alleged check kiting scheme to meet his real property obligations. As support for these "facts," the Cross-Petitioners again cite to inadmissible hearsay statements of its own counsel. The Cross-Petitioners also cite the Disclosure Statement prepared by the Chapter 11 Trustee in support of the Trustee's Plan; however, nothing in the pages cited of the Disclosure Statement has anything to do with the alleged admission.

Next, the Cross-Petitioners claim that the original settlement discussions provided for a stipulated judgment in the amount of $10 million. Again this "fact" is supported only by the inadmissible hearsay contained in a declaration of the Cross-Petitioners' own counsel.

The statement of facts contained in the Brief in Opposition, pp. 4-5, contains a long recitation of the alleged conversations between counsel for the Cross-Petitioners and counsel for the Cross-Respondent regarding the Cross-Petitioners' fears that the Cross-Respondent would breach the agreement, the reasons for the Cross-Petitioners continuation of the foreclosure sale of the Rowan Building and a history of the negotiations that led to the entry of the Stipulated Judgment. The only source for any of these alleged "facts" is, once again, the inadmissible hearsay in the declaration of counsel for the Cross-Petitioners.

The Cross-Petitioners frequently point to the fact that the Cross-Respondent testified at the hearing on the entry of the Stipulated Judgment that he was not threatened or

under any duress to enter into the Stipulated Judgment. The "hearing" however consisted only of a presentation of the Stipulated Judgment to the Superior Court Judge and the examination of Mr. Aslan by counsel for the Cross-Petitioners. The reality is that the Cross-Petitioners would not have entered into the Stipulated Judgment had Mr. Aslan testified that he was entering it under duress. His testimony in such circumstances cannot be held to reflect his true state of mind when entering into the Stipulated Judgment. In fact, the Cross-Respondent has consistently argued that he was under extreme financial pressure to resolve his disputes with the Banks as a result of their filing of lis pendens against all of his real estate holdings and the pending foreclosure of the Rowan Building.

Next, the Brief in Opposition recites as "fact" alleged conversations between the Cross-Respondent and his former counsel, Charles Rose, regarding Rose's interpretation of the Letter Agreement as providing for a forfeit of the Rowan Building proceeds if the Cross-Respondent attacked the Stipulated Judgment. This inadmissible hearsay and privileged information is derived from a declaration signed by Rose in support of the Cross-Petitioners' filings below after the Cross-Respondent brought a malpractice lawsuit against Rose. Once again, this kind of statement is not a "fact," but merely an allegation made by the Cross-Petitioners that is disputed by the Cross-Respondent.

The Cross-Petitioners contend that the Cross-Respondent's statement regarding the reason the Amana Corporation's offer to purchase the Stipulated Judgment was not consummated is incorrect. Although the reason for the failure of the parties to reach an agreement is not essential or relevant to the present question, the Cross-Respondent points out, once again, that the only support for the Cross-Petitioners' assertion is the declaration of its own counsel—inadmissible hearsay.

In conclusion, the Cross-Respondent and the Cross-

Petitioners have a marked disagreement about the circumstances which led to the Cross-Petitioners' claim in the Cross-Respondent's bankruptcy case. What is not at issue is that the claim is based on the provisions of the Stipulated Judgment and the Letter Agreement. The question before the bankruptcy court was, in essence, whether and in what amount should the Cross-Petitioners' claim be allowed.

D. Procedural Background.

The procedural background of the case has been thoroughly covered in both the Petition, the Brief in Opposition and the Cross-Petition. The Cross-Respondent accepts the correction made in the Brief in Opposition regarding whether the Cross-Petitioner requested a rehearing on the May 29, 1992, opinion issued by the Ninth Circuit Court of Appeals. The record indicates that the Cross-Petitioners did not request a rehearing en banc as was erroneously stated in the Petition.

ARGUMENT

A. Summary of Argument.

Due process requires that no person may be deprived of a property interest without notice and an opportunity for a meaningful hearing. The three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976) must be weighed and balanced to identify the kind of notice and type of hearing dictated by the due process clause.

The Cross-Petitioners arguably have no property interest at all in the Rowan Building proceeds, but assuming that they do, they have already had the opportunity for a judicial hearing on the merits of each argument raised in the Cross-Petition. There is no reason to reconsider the setoff issue underlying the Cross-Petition in the event the Petition is granted.

B. The Cross-Petitioners Have Received Due Process of Law.

The due process clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend. V.[2] Procedural due process requires at a minimum

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[2]The Cross-Respondent can find no authority for the basic premise upon which the Cross-Petition relies; that the Cross-Petitioners, banking corporations which are wholly-owned subsidiaries of foreign corporations, and "persons" within the meaning of the Fifth Amendment. The Petitioner concedes that "[i]t is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment," *Metropolitan Life Incs. Co. v. Ward*, 470 U.S. 869, 881 n. 9, 105 S.Ct. 1676, 1683 n. 9, 84 L.Ed.2d 751 (1985), and that alien individuals are protected by the due process clause of the Fifth Amendment, *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed. 2d 478 (1976). Chief Justice Rehnquist propounded the rationale for extending the Fourteenth Amendment's protection to a corporation's property rights in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 823-24, 98 S.Ct. 1407, 55 L.Ed. 2d 707 (1978) (Rehnquist, J. dissenting). Since the states character corporations and allow them to acquire and utilize property under state law, it follows that the states may not deprive a corporation of that property without due process of law. *Id.* "The word 'person,' however, is not a term of art with a fixed meaning whenever it is used." *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 316, 98 S.Ct. 584, 589, 54 L.Ed. 2d 563 (1978). To interpret the meaning of the work "person" in a statute, this Court has first examined the statute's language and purpose and, if no clue to its

that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *State v. Central State Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The opportunity for hearing "must be granted at a meaningful time and in a meaningful manner." *State v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965).

The Cross-Petition does not discuss the notice requirement, but appears to focus on whether the Cross-Petitioners

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meaning is discovered there, has sought the "indicia of congressional intent at the time the statute was enacted." *Ngiraingas v. Sanchez*, 495 U.S. 182, _____, 110 S.Ct. 1737, 1740, 109 L.Ed. 2d 163 (1990). Applying that method to the Bill of Rights, one notes that a corporation has no "life or liberty" interests, the two other interests protected by the due process clause. Thus the language of the Fifth Amendment does not appear on its fact to include corporate entities. The intent of the framers must be considered next. The Fifth Amendment is directed primarily to the protection of individuals and personal rights, *U.S. v. White*, 322 U.S. 694, 698, 64 S.Ct. 1248, 88 L.Ed. 2d 1542 (1944), and that is what was intended at the time the Fifth Amendment was ratified. If the Respondents are not among the "persons" protected by the due process clause of the Fifth Amendment, then they lack standing to bring the Cross-Petition and it should be denied on those grounds. *See, e.g., State of Alabama v. U.S. E.P.A.*, 871 F.2d 1548, 1554 (11th Cir. 1989), *cert. denied*, 493 U.S. 991, 110 S.Ct. 538, 107 L.E. 2d 535 (1989) (state was not among entities protected by due process clause of Fifth Amendment and lacks standing to claim that E.P.A. was compelled to provide it with notice and opportunity to be heard).

received an opportunity for hearing, and whether the opportunity for hearing was granted at a meaningful time and in a meaningful manner. Thus, the Cross-Petition asserts that the Cross-Petitioners are entitled to an evidentiary hearing on the issue of whether the Rowan Building resale proceeds should have been credited against the Cross-Petitioners' claim in the Cross-Respondent's bankruptcy case. The Cross-Petitioners argue that due process requires that they be afforded an evidentiary hearing in the event the Petition is granted and this Court either finds for the Cross-Respondent on the merits or remands the Cross-Respondent's case to the bankruptcy court for a factual determination of the penalty issue.

1. Identification of the Specific Dictates of Due Process Requires a Consideration of the Three Factors Enunciated in *Mathews*.

This Court has identified three distinct factors which must be considered in identifying the specific dictates of due process in any given scenario. Those factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed. 2d 18 (1976). These factors must be weighed and balanced to determine the kind of notice and type of hearing required to meet the mandate of the due process clause. *See, e.g., Orloff v. Cleland*, 708 F.2d 372 (9th Cir. 1983).

2. Application of the *Mathews* Test to the Case at Bar Shows That the Cross-Petitioners Have Received Due Process of Law.

The first factor to be considered under the three-part test set forth in *Mathews* is the private interest that will be affected by official action. Here, the very heart of the dispute is whether the Cross-Petitioners have any property interest in the proceeds from the resale of the Rowan Building. The $3.1 million credit has been remitted to the Cross-Respondent under the terms of the Stipulated Judgment and the Letter Agreement. The Cross-Petitioners claim that they should be excused from honoring this provision of the agreement, even though they have received the full amount of the Stipulated Judgment. The Cross-Respondent argues that the Cross-Petitioners have no property interest in the disputed sum, and thus no property interest to be protected under the due process clause.

The second factor to be considered is whether there is a risk of erroneous deprivation of any property interest through the procedure used. The risk appears to be quite small. Not only has the issue been extensively litigated in the bankruptcy court and the appellate courts with findings in favor of the Cross-Respondent at all levels, but the Cross-Respondent asserts that the disputed sum is not the property of the Cross-Petitioners.

The Cross-Petitioners appear to rely on two possible arguments to support their position that the Rowan Building proceeds should not have been credited against the claim. First, they argue that the Letter Agreement contained an implied covenant not to attack the Stipulated Judgment. This argument was considered by the Ninth Circuit Court of Appeals and rejected. The Ninth Circuit held that good faith lawsuits were always allowed and further found that any covenant not to sue would have applied to the merits of the original suit, not to the merits of the settlement of that

suit. *See* Pet., App. B-7, *citing Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Dist. Corp.*, 358 F.2d 432 (2d Cir. 1966).

Second, the Cross-Petitioners claim they were excused from their performance under the contract when the Cross-Respondent breached the Letter Agreement and/or the Stipulated Judgment. Once again, this issue was considered by the Ninth Circuit Court and found to be without merit. Pet., App. B-7. The Cross-Petitioners have been paid the full amount owed to them under the agreement, thereby receiving the full benefit of the bargain.

If the Cross-Respondent is successful in having the claim reduced by the amount of the $2 million penalty, the Cross-Petitioners argue that this successful attack on the Stipulated Judgment would constitute a breach and thus vitiate their performance. This argument ignores the fact that the Cross-Respondent has *already* attacked the Stipulated Judgment, regardless of whether that attack is ultimately successful. This fact existed at every stage of the proceedings below and none of the lower courts found that it constituted a breach of the agreement. There is no need to consider the same argument again.

Due process requires,

> at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.
>
> Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. . . . What the Constitution does require is "an *opportunity* . . . granted at a meaningful time and in a meaningful manner," [citing *State v. Manzo*, 380 U.S. at 552 (emphasis added)], "for [a] hearing appropriate to the nature of the case,"

> [citing *State v. Central State Bank & Trust Co.*, 339 U.S. at 313]. The formality and procedural requirements for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. [Footnote omitted.]

Boddie v. Connecticut, 401 U.S. 371, 377-78, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971).

Where this Court has established a due process right to an evidentiary hearing, the person at risk of being deprived of a property interest has had a far more important interest to protect than the alleged property interest of the Cross-Petitioners. For example, welfare recipients were held to be entitled to an evidentiary hearing prior to the termination of their benefits in *Goldberg v. Kelly*, 397 U.S. 254, 266-71, 90 S.Ct. 1011, 1019-22, 25 L.Ed. 2d 287 (1970), and suits for pre-judgment replevin of property were held to require more than a mere ex parte proceeding before a court clerk in *Fuentes v. Shevin*, 407 U.S. 67, 96-97, 92 S.Ct. 1983, 2002-03, 32 L.Ed. 2d 556 (1972).

In the case at bar, the Cross-Petitioners have already been granted a hearing on each argument they now raise. The Cross-Respondent contends that none of the Cross-Petitioners' arguments require any additional factual determination to be resolved. An evidentiary hearing is not necessary to decide the issues of law raised by the Cross-Petitioners.

The third factor that must be considered under the *Mathews* test is the government's interest. The government's interest here is in the prompt resolution of disputes in the courts and in judicial economy. This interest in bringing final resolution of the issues is significant and outweighs the minimal risk to the Cross-Petitioners that they will be deprived of a property interest without due process of law.

C. The Issue Raised in the Petition Is Not Tied to the Issue Raised in the Cross-Petition.

The Petition seeks a writ of certiorari to the Ninth Circuit Court of Appeals because the Cross-Respondent was never granted an opportunity to be heard regarding whether the Cross-Petitioners' claim included an invalid penalty. The Cross-Respondent has argued that the bankruptcy court misapplied the doctrine of res judicata in the context of the claims allowance process.

The Cross-Petition seeks a writ of certiorari only in the event the Cross-Respondent is successful on the merits. The Cross-Petitioners claim that if the penalty portion of the claim is held to be invalid, then that would entitle them to a reconsideration of the merits of their contract interpretation argument.

The only relationship between the Petition and the Cross-Petition is that both arise out of the same set of circumstances and both involve a dispute over the allowed amount of the claim. The claims allowance process requires the bankruptcy court to consider whether a claim should be allowed against the estate and, if so, in what amount it should be allowed. Both the Petition and the Cross-Petition deal with the amount question. Other than this surface similarity, however, there is no relationship between the two. The Cross-Respondent's penalty issue does not require any new consideration of the setoff of the Rowan Building proceeds.

Even if the Cross-Petitioners' claim is ultimately lowered in the amount of the illegal penalty, there is nothing in the Stipulated Judgment or Letter Agreement which would indicate that the Rowan Building proceeds should not be credited. The documents on their face provide that the proceeds will be credited to the Cross-Respondent when the Stipulated Judgment amount is paid in full. The courts below have unanimously agreed that the

contract has been correctly interpreted, that the Cross-Respondent has performed, and that the $3.1 credit was properly applied.

D. The Cross-Petitioners' Reliance on Supreme Court Rule 10.1(a) Is Misplaced.

The Cross-Petitioners rely on Supreme Court Rule 10.1(a) as their reason for this Court to grant the Cross-Petition. Rule 10.1(a), however, states that "[w]hen a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision," then this Court will consider granting a petition for a writ of certiorari. S.Ct.R. 10.1(a). The Cross-Petitioners do not point to any departure from the accepted course of judicial proceedings by the Ninth Circuit Court of Appeals or any lower court. Instead, the Cross-Petitioners seem to argue that *this* Court will have departed from the accepted and usual course of judicial proceedings if it fails to grant the Cross-Petition under certain conditions. This cannot be a reason for granting a writ of certiorari to the Ninth Circuit Court of Appeals.

CONCLUSION

The Cross-Petition for Writ of Certiorari should be denied, regardless of the disposition of the Petition. The Cross-Petitioners have not been deprived of due process of law under the Fifth Amendment. They have no property interest to be protected, but assuming they have a colorable claim to the Rowan Building proceeds, they have already been granted notice and a meaningful hearing in the lower court on each and every argument made in the Cross-Petition.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

In re MOSES N. ASLAN,
Debtor.

THE HONGKONG AND SHANGHAI BANKING CORPORATION AND CENTRAL BANK,
Petitioners,

vs.

MOSES N. ASLAN,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF THE HONGKONG AND SHANGHAI BANKING CORPORATION AND CENTRAL BANK IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF OF THE HONGKONG AND SHANGHAI BANKING CORPORATION AND CENTRAL BANK IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

In their Cross-Petition for Writ of Certiorari (the "Cross-Petition"), The Hongkong and Shanghai Banking Corporation ("Hongkong Bank") and Central Bank (sometimes collectively "the Banks") argued that if (and only if) the certiorari petition of Moses N. Aslan ("Aslan") were granted, *then* due process would

require that the Banks be afforded a hearing on whether Aslan, if he is excused from paying $2,000,000 of the Banks' judgment amount, is still entitled to a contractual credit against the judgment amount.

In his Brief in Opposition,[1] Aslan makes four specious arguments:

1. Aslan argues that the only evidence before the lower courts that his indebtedness to the Banks resulted from a check kite was inadmissible hearsay. Aslan's argument is unavailing, because (a) no objection was made to the evidence in question; and (b) all the evidence Aslan now challenges constituted *his own admissions*, which obviously were not hearsay at all. Moreover, even if, contrary to *all* the evidence, Aslan somehow could establish that he took the Banks' millions with their consent, the Banks' claims have been reduced to a final judgment, making the basis for the claims irrelevant to Aslan's arguments.

2. Aslan urges that Hongkong Bank, a foreign corporation, and Central Bank, the subsidiary of a foreign bank, are not entitled to due process of law and, therefore, cannot have the hearing they request. That argument contravenes all applicable authority. Foreign corporations may not have their valuable assets confiscated without due process.

3. Aslan asserts that due process for the Banks would not require, in any event, an evidentiary hearing. Again, Aslan's argument contravenes the authorities. Property rights cannot be taken without a meaningful opportunity to be heard.

4. Finally, Aslan asserts that Rule 10.1 of the Rules of this Court does not apply because the Court of Appeals did not depart from the usual course of judicial proceedings. Under Rule 10.1, this Court plainly has the power to review the entire case, such that *if* Aslan's Petition is granted, *then* the Banks' Cross-Petition

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[1]Aslan has filed a brief in opposition to the Banks' Cross-Petition, but no reply brief on his own Petition for Writ of Certiorari. Accordingly, this Reply Brief by the Banks addresses only those new issues raised in Aslan's Brief in Opposition.

may be considered, in order to *prevent* a departure from the usual course of proceedings and a miscarriage of justice.

ARGUMENT

1. There Is Overwhelming Evidence Of The Check Kite.

Aslan first argues that all the evidence that he incurred his $8.3 million debt to the Banks through a check kite was inadmissible hearsay.

Even if his argument were correct, it would not affect the Banks' rights under the final Judgment, or under the Letter Agreement which gave Aslan a credit against the Judgment conditioned on his full performance and ratification of the Judgment. However, all the evidence cited by the Banks was admissible in any event.

The evidence attacked by Aslan consisted of declarations (a) by persons to whom Aslan admitted the check kite, and (b) by Aslan's former counsel, Charles T. Rose ("Rose"). However, the declarations recited *admissions* made by Aslan, which are not hearsay but fall within a well settled exception to the hearsay rule. Fed. R. Evid. 801(d)(2). Moreover, Rose's statements were not protected by the attorney-client privilege, because Aslan had already commenced a malpractice action against Rose. [Aslan's Opposition Brief, at p. 6; Cal. Evid. Code § 958.] Further, Aslan has waived any evidentiary objections by failing to make them below.

Finally, Aslan has not offered in this Court, nor did he offer in the courts below, any alternative explanation of how he incurred his indebtedness to the Banks. It was, purely and simply, a check kite.

2. Foreign-Owned Corporations Are Entitled To Due Process.

In his Brief in Opposition, Aslan asserts that he "can find no authority for the basic premise upon which the Cross-Petition relies; that the Cross-Petitioners, banking corporations which are wholly-owned subsidiaries of foreign corporations, and [*sic*] 'persons' within the meaning of the Fifth Amendment." Aslan con-

cedes, however, that "[i]t is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment,' *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9, 105 S.Ct. 1676, 1683 n.9, 84 L.Ed. 2d 751 (1985), and that alien individuals are protected by the due process clause of the Fifth Amendment, *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed. 2d 478 (1976)." Oppos. Brief at 8 n.2. The principles conceded by Aslan defeat his argument that the Banks have no due process rights.

In *United States v. Verdugo-Urquidez*, 494 U.S. 1092, 110 S.Ct. 1056, 1064, 108 L.Ed. 2d 1968 (1990), this Court observed that a series of United States Supreme Court decisions has held that aliens enjoy certain constitutional rights. Among other things, resident aliens are "persons" within the meaning of the Fifth Amendment. *Id.* at 1064; *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596, 73 S.Ct. 472, 97 L.Ed. 576 (1953). Therefore, even if the Banks were considered resident aliens because of their foreign connections, that would not derogate from their status as persons within the meaning of the Fifth Amendment.

In Russian Volunteer Fleet v. United States, 282 U.S. 481, 491, 51 S.Ct. 229, 75 L.Ed. 2d 473 (1931), the Supreme Court held that a corporation organized under the laws of Russia was an alien friend, entitled to the Fifth Amendment due process protections against the taking of property.

> "As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for public use without just compensation establishes a standard for our government which the Constitution does not make dependent upon the standards of other governments." 282 U.S. at 491-492.

Thus, "[e]ven non-resident aliens are entitled to the protection of the Fifth Amendment's prohibition on unlawful takings." *Alvarez-Mendez v. Stock*, 746 F.Supp. 1006, 1015 (C.D. Cal. 1990), *aff'd*, 941 F.2d 956 (9th Cir. 1991).

Under all these authorities, it is manifest that the Banks are entitled to the due process protections of the Fifth Amendment.

3. Due Process Requires That If Aslan Succeeds In Reducing The Amount Of The Banks' Judgment, The Banks Then Are Entitled To An Evidentiary Hearing On Whether Consideration For The Rowan Building Credit Has Failed.

In his Opposition, Aslan argues that because the lower courts considered the parties' rights with regard to the Rowan Building credit under the Letter Agreement at the time Aslan's "penalty" argument was before the courts, therefore the Banks have already had the only hearing to which they are entitled.

Aslan ignores both the applicable case law on the subject of what constitutes a hearing that comports with due process requirements, and also the fact that the Banks' Cross-Petition is expressly linked to Aslan's Petition.

The Banks' argument, to the effect that if Aslan successfully attacks the Judgment, consideration for the Letter Agreement has failed and the Banks need not give him the Rowan Building credit hereunder, has not been the subject of an evidentiary hearing, for the simple reason that Aslan's attacks on the Judgment have been rejected at every stage. The lower courts have held in effect that because the Banks are receiving the entire amount of the Judgment and Aslan's attacks on the Judgment have been rejected, the Banks have nothing to complain about.

That may change if Aslan obtains a favorable result in this Court, or upon remand from this Court. No hearing has been held on whether, if Aslan succeeds in reducing the Judgment, he then has forfeited any benefits under the Letter Agreement. The Banks seek a hearing on that limited question, if and only if Aslan's Petition is granted.

4. The Banks Are Entitled To A Meaningful Hearing.

In *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976), this Court stated:

> "This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " [Citations omitted.]

Further, the court in *Mathews*, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), stated: "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." The Court listed three factors relevant to determining if official action comports with due process rights: (1) the private interest affected; (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value of additional or substitute safeguards; (3) and the government's interest. 424 U.S. at 335. *Accord, Little v. Streater*, 452 U.S. 1, 6, 101 S.Ct. 202, 68 L.Ed.2d 627 (1981).

In *Orloff v. Cleland*, 708 F.2d 372, 379 (9th Cir. 1983), the Court of Appeals observed that under *Mathews*: "The central meaning of procedural process is that parties whose rights are to be affected are entitled to be heard at a meaningful time and in a meaningful manner." Similarly, in *Propert v. District of Columbia*, 948 F.2d 1327 (D.C. Cir. 1991), the Court stated "The constitutional requirement of some kind of hearing means, at a minimum, that the affected individual must have a meaningful opportunity to present his case before a neutral decision maker." *Id.* at 1333.

Under these standards, it is clear that if Aslan obtains a $2,000,000 advantage, in contravention of the Letter Agreement in which he agreed to pay the entire Judgment amount, then the Banks should receive a hearing.

First: The private interest affected is the right to more than $3.1 million plus interest, not a trivial sum.

Second: Because there has been no evidentiary hearing on the question, there is a serious risk that the Banks will be deprived of their rights if Aslan prevails on his "penalty" argument. Indeed, as the Banks have explained in their Cross-Petition, the lower courts held that the Banks had obtained all the benefits of the Judgment, and therefore Aslan was entitled to retain the consideration that had passed to him under the Letter Agreement. If Aslan succeeds in depriving the Banks of the benefit of the Letter Agreement, then it seems likely that, upon remand, the lower courts would examine, and change their position on, whether the Banks had obtained the consideration for which they had bargained in exchange for giving Aslan the conditional Rowan Building credit.

Third: If Aslan's Petition is granted, reviewing the entire case, either in this Court or on remand, will not result in a cognizably greater burden on the Court system than if Aslan's arguments were reconsidered in isolation.

Under these circumstances, there is no justification for allowing Aslan a $2,000,000 reduction of the Judgment, without at the same time giving the Banks a full and fair opportunity to argue that such a result deprives Aslan of any right to further savings under the Letter Agreement.

5. This Court May Grant The Cross-Petition.

Aslan argues that the Cross-Petition must be denied because Rule 10.1(a) only provides for certiorari where a "court of appeals . . . has . . . departed from the accepted and usual course of judicial proceedings". Here, Aslan's argument goes, any such departure would be by this Court, or by the lower courts after remand.

Aslan's argument is entirely unavailing.

First, Rule 10.1 by its own language is "neither controlling nor fully measuring the Court's discretion" to grant a writ of certiorari. Indeed, the Cross-Petition cites (at p. 6, n. 2) authority for

the proposition that the Court may review the Banks' claims *sua sponte*. Further, "[a] petition for writ of certiorari can expose the entire case to review." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988).

Second, and in any event, the Banks contend that if Aslan prevailed on his argument but the Banks were foreclosed from making theirs, that result would be a radical departure "from the accepted and usual course of judicial proceedings."

In short, if Aslan's petition is granted and receives favorable action, this Court's power also to review the Banks' claims is not restricted.

6. Conclusion.

Aslan's Opposition fails to recognize that the Banks seek relief only if, and to the extent that, Aslan obtains a favorable disposition on his Petition. Equity and due process require that if Aslan prevails on his claims, and the Judgment amount is reduced, the Banks at least receive a hearing on whether they still must give Aslan the benefit of a Letter Agreement, the consideration for which was ratification and payment of the *entire* Judgment.

For all the reasons stated herein and in the Cross-Petition, the Banks respectfully submit that Aslan's Petition should be denied; but that if Aslan's Petition is granted, this Cross-Petition also should be granted so that the entire case may be remanded for any appropriate proceeding in the Bankruptcy Court.

Respectfully submitted,

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